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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

ENTERED
Office of Proceedings
December 6, 2019
Part of
Public Record

Docket EP 757

**POLICY STATEMENT ON DEMURRAGE AND ACCESSORIAL RULES
AND CHARGES**

**REPLY COMMENTS OF
THE NATIONAL GRAIN AND FEED ASSOCIATION**

Pursuant to the Notice of Proposed Statement of Board Policy served in this docket on October 7, 2019 (“Policy Statement”), the National Grain and Feed Association (“NGFA”) respectfully submits these reply comments in this proceeding for consideration by the Surface Transportation Board (“Board” or “STB”).

I. Identity and Interest of NGFA

Established in 1896, the NGFA consists of more than 1,100 grain, feed, processing, exporting and other grain-related companies that operate more than 7,000 facilities and handle more than 70 percent of all U.S. grains and oilseeds. Its membership includes grain elevators; feed and feed ingredient manufacturers; biofuels companies; grain and oilseed processors and millers; exporters; livestock and poultry integrators; and associated firms that provide goods and services to the nation’s grain, feed, processing and export industry. The NGFA also consists of 33 affiliated State and Regional

Agribusiness Associations. In addition, the NGFA has a strategic alliance and is co-located with the North American Export Grain Association, and has a strategic alliance with the Pet Food Institute.

II. Class I Railroads' Continued Imposition of Unfair and Onerous Demurrage and Accessorial Rules and Charges Reinforces the Need for the STB to Adopt NGFA's Recommended Changes to Board's Proposed Policy Statement

In its Opening Comments, the NGFA stated that in the months since the Board's May 22-23 oversight hearing focusing upon demurrage and accessorial practices engaged in by Class I railroads, it was "unaware that *any* of the Class I railroads officially have amended their tariffs in a substantive or meaningful way to make them more commercially fair, reciprocal or commercially achievable under real-world facility operating conditions, and that there was "very little prospect that the current situation will improve in any demonstrable way unless significant improvements are made to the Board's proposed approach." NGFA Opening Comments at 5.

Unfortunately, NGFA's member companies report that its initial assessment largely is unchanged, and in fact may be regressing despite the Board's issuance of the proposed Policy Statement – particularly with respect to the lack of reciprocity, an essential element in fulfilling the purposes of achieving efficient utilization of both railroad and shipper rail assets.

For example, Norfolk Southern Railway (NS) on December 1, 2019 issued a notice regarding changes implementing a "tiered demurrage and storage structure" under its demurrage and storage (NS 6004-D), Accessorial (NS 8002-A) and Conditions of Carriage #1-E tariffs that does not provide the same credits for private cars as it does for railroad-controlled (system) cars. Specifically, the NS still is providing no credits for loading or unloading of private cars, versus one credit provided when loading or unloading railroad-controlled cars. Nor does NS award any

credits when it fails to perform a switch at a facility, thereby creating a backlog of cars (a potential bunching situation) for the next subsequent switch. Further, it widely is believed by NGFA members that NS's shift to a tiered demurrage and storage rate structure is an attempt to recover the revenues "lost" when it amended its congestion policy because it was "double-dipping" by also assessing demurrage and accessorial charges on the same cars, and at times was doing so even when NS was responsible for the congestion or delay. One NGFA-member company estimates that NS's new tiered-pricing formula will result in its *monthly* demurrage bill increasing from \$7,200 to \$12,240 at a single facility – a \$5,040 increase. In addition, NS is removing the previous 5,000-pound weight tolerance granted before imposing a \$2,000-per-nonhazardous-material-car overload charge, even if the additional weight is the result of weather conditions (e.g., buildup of ice and snow etc.). Further, it is reducing the time a rail customer has to file an overcharge or duplicate payment claim from three years to one year. All of these charges and practices fly in the face of the Policy Statement and the Board's admonition to railroads at the conclusion of the Oversight Hearing to amend their demurrage and accessorial charges and practices to be more commercially fair and reasonable.

One day after NS's announcement, CSX Transportation Inc. (CSXT) on December 2, 2019 announced wide-ranging changes to its CSXT Tariff 8100. These changes include a policy change regarding the assessment of demurrage on Thanksgiving Day and the following day, Christmas Eve and Christmas Day, and New Year's Eve and New Year's Day. But rather than simply stating that demurrage calculations will not include those days, CSXT states it only will provide "holiday credits," without amending its policies under which those credits may expire without ever being utilized by the rail customer.

As for the Union Pacific Railroad Company (UP), its amendment to its so-called “Not Prepared for Service” tariff item 9055 announced on May 16, 2019 – less than a week before the Board’s May 22-23, 2019 public hearing – still does not contain any reciprocity provisions to address situations in which UP is the cause of the customer not being ready for service. This deficiency was specifically highlighted by Chairman Begeman *over a year ago* in her November 20, 2018 letter to UP, yet UP still has not amended its tariff to comply. NGFA continues to be informed by member companies that UP frequently either cannot or will not inform shippers within eight hours of when its crews actually will arrive to spot or pull a train.

The BNSF Railway (BNSF) also has made changes to its accessorial practices to the detriment of its customers. Specifically, on November 18, 2019, BNSF notified its customers that effective January 1, 2020, it is amending its 6200-B Item 400 Diversion Policy to eliminate the current one empty diversion exemption for empty private cars, which previously allowed its customers to request that empty private cars be diverted to alternate destinations or gateways without a significant charge. Under this change, *any* diversion of an empty car on BNSF which does not follow the exact reverse route of the preceding loaded revenue move will be rebilled and assessed a line-haul rate from the point of diversion to its destination. The practical effect of this change is to increase the overall cost of transportation through the imposition of excessive charges that would make it economically infeasible to move empty private cars to loading sites other than the origin of the preceding loaded-revenue move.

The NGFA believes these examples of continuing measures taken by the Class I railroads to adopt unfair, unreasonable and non-reciprocal demurrage and accessorial practices bear out the merits of its original recommendations – expressed in NGFA’s Written Submission in

Docket No. EP 754 and reiterated and reinforced in oral testimony and its Supplemental Comments – that the Board must utilize its statutory authority and precedent to determine proactively – i.e., without requiring the filing of a formal complaint – that certain railroad rules governing demurrage and accessorial practices and charges *per se* are unlawful because they lack commercial fairness, are commercially unachievable and/or are non-reciprocal. The Board then should direct that the offending railroad amend its rules and tariffs accordingly. The NGFA continues to believe such an approach could be implemented in a manner that allows rail customers to submit “show-cause” filings or petitions calling on the STB to declare that a given carrier has not complied with the Board’s directives, and order the railroad to take corrective actions and conform its tariffs accordingly to come into compliance. The NGFA also again urges the Board to provide further clarity on certain egregious railroad demurrage and accessorial practices, which we believe can be done in a way that does not supplant the process of certain fact-specific disputes being resolved through the filing of a formal complaint.

The NGFA notes that its recommendations that certain demurrage and accessorial practices should be deemed by the Board to be unreasonable *per se* is supported by several other shipper organizations submitting comments in this proceeding, including on such specific issues as:

- **Free Time:** The NGFA reiterates that the Board should amend its policy guidance to state that rail carriers generally should provide a minimum of 24 to 48 hours of free time to load or unload agricultural products after ***actual placement*** of the cars at the facility during normal operating hours (unless otherwise mutually agreed to by the rail customer and the carrier), and that the Board’s policy should state that it would

look with disfavor on railroads providing zero free time. Many agricultural shippers physically cannot load cars within 24 hours. Further, the NGFA cannot envision that **any** of the conditions cited by the Board as potentially justifying reductions in free time (e.g., advances in “technology or productivity,” “service improvements,” “reducing systemic problems with inefficient behavior or practices by shippers or receivers” or other “rail...tariff provisions or program features”) would make NGFA’s recommended 24- to 48-hour free-time allowance unreasonable or zero free time justifiable. Other organizations similarly believe zero-day free time for loading and unloading cars is *prima facie* unreasonable. See National Industrial Transportation League (NITL) at 5, Corn Refiners Association (CRA) at 5 and 10, The Fertilizer Institute at 5, and Archer Daniels Midland (ADM) Company at 2. At a minimum, rail carriers should bear the burden of proof for justifying any shorter period of free time.

In addition, the NGFA reiterates its strong belief that the Board’s policy statement should encompass reciprocity provisions by directing that carriers provide comparable remuneration to rail customers if they fail to make actual placement of cars in accordance with the train’s trip plan within the same free-time allocations provided to shippers and receivers for loading and unloading cars.

- **Bunching:** The NGFA again urges the Board to more clearly state that in instances involving carrier-caused disruptions and variations in service resulting from bunching of railcars at a customer’s facility, that demurrage and accessorial charges generally would not be justified. The NGFA also believes reciprocity provisions need to be incorporated into this section of the Board’s Policy Statement.

- **Overlapping Charges:** The NGFA reiterates its recommendation that the Board expand upon its policy guidance by also referencing the fact that rail carriers’ imposition of private car storage charges and embargoes to address congestion will be considered when determining the commercial fairness of congestion and demurrage charges, as well as to add a reciprocity component if a carrier causes private cars to dwell while in the railroad’s custody during the time between empty release and loaded billing, and the subsequent constructive or actual placement at destination.

The NGFA also reiterates its previous recommendations concerning: (1) invoicing, including the need for the Board to expand on what constitutes “appropriate action” by railroads to “ensure that demurrage charges are accurate and warranted”; (2) clearly specified dispute-resolution procedures within railroad tariffs, as well as clarification of what the Board believes constitutes a “reasonable time” for a shipper or receiver to request additional information from a carrier to dispute an erroneous charge, as well as for the rail carrier to respond; (3) the reasonableness of railroads’ policies for providing credits or remuneration (*see also* TFI at 9); (4) appropriate notice of tariff changes, including the need to add a reciprocity component for customers whose investments in facilities have been undermined or negated by unilateral changes made by carriers in their operating plans; (5) clarifying that the Board’s principles apply to accessorial practices and charges, in addition to demurrage; (6) adding a policy statement on the legal rules applicable to challenging the reasonableness of the level of accessorial charges that are not fuel surcharges; (7) prohibiting intimidating legal language in tariffs, contracts of carriage or other rail documents that are designed to dissuade rail customers from challenging commercially unfair, unachievable and/or non-reciprocal demurrage and accessorial rules and practices; (8) establishing an advisory board comprised of rail industry stakeholders to provide

the Board with regular feedback regarding railroad rules and practices pertaining to demurrage and accessorial, a concept also supported by other groups, *see* CRA at 11; and (9) applying the same principles of commercial fairness and reciprocity for demurrage and accessorial practices to Class II and III railroads, as well to car-specific information for invoices. Concerning this latter aspect, the NGFA recommends the Board consider the contention of NITL that the absence of such a requirement for invoicing practices may create a loophole that could lead to the unintended consequence of encouraging Class I railroads to demand that such invoices instead be issued by Class II and III railroads simply to evade the Board’s regulatory requirements. *See* NITL at 10.

Finally, for instances involving demurrage and accessorial rules and charges that the Board believes warrant fact-specific adjudication, the NGFA reiterates its strongly held belief that it is incumbent upon the STB to develop an accessible, streamlined, inexpensive and timely process for considering and deciding such complaints brought by rail users. NGFA Opening Comments at 7-8.

III. Example of Egregious Accessorial Practice that the Board Should *Per Se* Rule to Be Unreasonable and Unlawful

An example of an egregious accessorial practice that the NGFA believes the Board should find *per se* to be unreasonable and unlawful is the UP’s assessment of “deadhead movement” charges under UP Tariff 6004-C, Item 9613. Under this item, if a locomotive remains with a unit train at a customer’s facility, the customer has 24 hours to load or unload the train – designated as “free time.” Once the free time is exceeded, the customer is charged an “Asset Utilization Charge” of \$200 per locomotive on the unit train per hour. *Id.* at Paragraph 3. However, per the tariff terms, if a customer does not believe it can unload or load the unit train within the 24 hours or wishes to stop being assessed “Asset Utilization

Charges” once the free time has expired, it “may elect to pay for Deadhead Moves...by requesting UP remove the locomotives.” *Id.* at Paragraph 4. Further, if UP so removes the locomotives “at the customer’s request,” then the customer is charged \$3,200 for the locomotive being removed, and then another \$3,200 when the locomotive is returned – resulting in a total charge of \$6,400 for each instance a locomotive is removed and returned.

As written, Item 9613 necessarily presumes that the 24-hour free time is feasible in the normal course of business, and provides the shipper or receiver with options to limit its exposure to extra charges if that time cannot be met. However, in today’s industry, most unit train grain shippers and all ethanol shippers that ship by unit trains physically cannot load, and in some cases unload, a unit train within 24 hours, a fact that UP knows well, since this has been the case for many years. As the Board heard during its Oversight Hearing, for unit train grain shippers, the charge clearly is designed by UP to exert sufficient economic pressure to cause the customer to shift from unit train to manifest train service. See, e.g., Docket No. EP 754, *Oversight Hearing on Demurrage and Accessorial Charges*, Transcript of May 22, 2019 hearing session at 157:

COMMISSIONER OBERMAN: And so, two questions – the 35 percent of your customers who are not unloading in 24 hours, why is that? Are they physically able to do it in your view?

MR. ROCKER (of Union Pacific Railroad Company): In some cases, we do not know if they are physically able, and so in every case we are providing them with an alternative service solution.

COMMISSIONER OBERMAN: Such as?

MR. ROCKER: A manifest product. So, we do work with our customers to do that if that’s the choice, that they don’t believe they can unload in the 24 hours.

Thus, this charge is **not** for the purpose of incentivizing a grain or ethanol shipper to load a unit train in 24 hours, since doing so physically is not possible, but rather to either (1) force the shipper to

abandon unit train service altogether; or (2) if it cannot shift to manifest, simply pay UP additional revenues for its service. Contrary to Mr. Rocker's statement, not all of UP's customers, in particular ethanol shippers, can change their service to manifest. The NGFA is informed by its members that since this accessorial charge was implemented, in situations in which the shipper cannot load a unit train within 24 hours, UP unilaterally has been removing the locomotives and crews upon arrival if the customer does not have a loaded train ready to be picked up. UP then assesses the \$3,200 charge, and then again reimposes the same the \$3,200 charge to merely return and pick up the loaded trains. UP then takes the locomotives and crews and uses them to provide rail service elsewhere on its system during the interim while the train is being loaded.

This "Deadhead Move" charge is unreasonable on its face for several reasons. First, the temporary removal of locomotives from unit trains for grain commodities and ethanol is not new; it has been occurring for many years precisely because such trains cannot be loaded and, in some cases unloaded, within 24 hours. Both UP and its customers have benefited from this practice when it has been reasonably applied. For example, when UP leaves the empty train and takes the locomotives and crew to serve other customers on its system, it is benefitting from that asset utilization. Previously, UP did not assess an additional charge for this activity, perhaps because the costs associated with the movement of locomotives in this manner have been included in the linehaul freight rates that UP charges.

Second, assessing this charge against ethanol shippers in particular is patently unreasonable because (1) they physically cannot load an empty unit train within 24 hours, a fact of which UP is well aware and (2) there currently is no operationally or economically feasible way for ethanol shippers that currently ship by unit train service to switch to manifest service. Consequently, for ethanol shippers, the 24-hour free time and assessment of the Deadhead Move or Asset Utilization Charges violate the

Board's policy principle that where charges are imposed for circumstances beyond the shipper's reasonable control, they do not accomplish their purpose to incentivize behavior to encourage efficiency in asset utilization – the stated rationale for and objective of the rail carriers' accessorial rules and charges – and the purpose of such charges is not fulfilled. Consequently, the assessment of accessorial charges for circumstances beyond the shipper's reasonable control do not fulfill the purpose of the charge and, therefore, are unreasonable.

Third, UP's stated rationale for the charge is nonsensical. In Docket No. EP 754, UP stated that the deadhead charge, in addition to allegedly recovering costs, "seeks to...incentivize customer choices that advance the interests of network fluidity and other customers in reliable transportation service." Union Pacific's Supplemental Comments in Docket EP 754 at 16. The meaning of this statement is far from clear. Specifically, is UP claiming that the \$6,400 total charge promotes the interests of network fluidity and other UP customers because it provides a financial incentive for customers to keep UP's locomotives in their possession for 24 hours or longer through payment of asset utilization charges up to the \$6,400 amount? If so, then how would a customer retaining UP's locomotives increase UP's asset utilization or the interests of UP's other customers?

Fourth, there is no justification for the charge if UP immediately removes the locomotives and crews from an empty train and uses them elsewhere on its system while the train without power is being loaded. There is no difference between this action and UP removing the locomotives "at any time" under Item 9613, paragraph 1, for which there is no associated charge. In fact, if UP's goal is to increase locomotive utilization, then it should offer remuneration to its customers to incentivize them to let UP remove locomotives from their trains while those cars are being loaded and utilize them elsewhere on UP's system.

Finally, Item 9613 and deadhead charges in particular are unreasonable because of the complete absence of any reciprocity in their implementation. Specifically, the tariff does not compensate customers in any way for the costs they incur when UP decides to remove the locomotives for any reason, which can be substantial in terms of actual costs to adjust facility operations, as well as lost-business-opportunity costs. More egregiously, while UP charges its customers a \$3,200 deadhead charge each time it picks up a loaded train, its customers receive no compensation and UP is not penalized in any way if UP fails to return with the locomotives in a timely manner to pull a billed unit train released for transportation. Thus, there is no reciprocal incentive in Item 9613 for UP to advance “network fluidity,” asset utilization, or its customers’ interests. To be appropriately reciprocal and balanced, when UP does not return with locomotives in a timely manner after its customers have complied with UP’s requirements for preparing and releasing the train, UP should grant remuneration for the \$3,200 it charges for deadhead moves.

In short, the Deadhead Moves charge within Item 9613 is unreasonable on its face and the NGFA again urges the Board to take the affirmative step of directing UP to amend its tariff to comport with the Policy Statement and standards of reasonableness.

IV. The Board Must Summarily Reject the Association of American Railroads’ Incorrect, Misleading and Spurious View of the Legal Basis for the Board’s Action

Finally, the NGFA commends and strongly supports the Board’s two fundamental proposed principles for determining the reasonableness of demurrage and accessorial rules and charges, namely that they (1) “...are not reasonable when they do not serve to incentivize the behavior of shippers and receivers to encourage the efficient use of rail assets...(and) should not

be assessed in circumstances beyond the shipper's or receiver's reasonable control"... (and that) revenue itself is not the purpose" (Policy Statement at 21); and (2) "transparency and mutual accountability by both rail carriers and the shippers and receivers they serve are important factors in the establishment and administration of reasonable demurrage and accessorial rules and charges." (*Id.*).

Concerning this matter, the NGFA fully supports and advocates adoption of the Reply Comments being submitted by the North American Freight Car Association (NAFCA) that dissects and refutes the incorrect, misleading and spurious legal arguments proffered by the Association of American Railroads (AAR) and several of its Class I railroad members in an obvious attempt to dissuade the Board from taking the meaningful action necessary to reign in egregious, commercially unfair, commercially unachievable and non-reciprocal demurrage and accessorial rules and charges. The NGFA joins NAFCA and presumably other shipper groups in urging the Board to summarily reject the AAR's and its Class I railroad members' arguments out of hand.

V. Conclusion

The NGFA appreciates the Board's consideration of its Reply Comments and recommendations. We urge the Board to proceed promptly to issue final rules and principles concerning this important matter.

Respectfully submitted,



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December 6, 2019